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IN THE

Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CANCER SOCIETY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Do Title I and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*, properly invoke Congress' enforcement authority under Section 5 of the Fourteenth Amendment?

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INTEREST OF *AMICUS CURIAE*

The American Cancer Society ("ACS") is a nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives and diminishing suffering from cancer through research, education, advocacy and service.[1] ACS consists of more than two million volunteers nationwide who are working to conquer cancer and to promote beneficial policies, laws and regulations for those affected by cancer. ACS believes that the Americans with Disabilities Act of 1990 ("ADA") is a vital law because it shields persons with a history of cancer from unconstitutional discrimination.

ACS is submitting this *amicus* brief to place before the Court the views of members of the public and health professionals committed to improving the quality of life of cancer patients. The evidence shows that discrimination against persons with cancer, particularly by employers, has been a persistent problem in the United States. In many instances, an employee's only access to health care is through an employer-based insurance program. Thus, an employer that discriminates on the basis of a cancer diagnosis may not only destroy the patient's financial well being, but may also deprive the patient of life-saving therapies.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for either party authored any part of this brief and that no one other than *amicus curiae* provided any financial support for the preparation of this brief.

Pursuant to Supreme Court Rule 37.2, written consent to the filing of this brief has been obtained from counsel for Petitioners and Respondents, and from the Solicitor General of the United States, and the documents reflecting consent have been filed with the Clerk's office.

ACS believes that no employer should have the right to discriminate against cancer survivors. As the most recognized representative of cancer survivors, ACS is well suited to address issues relating to discrimination against those with a history of cancer.

SUMMARY OF ARGUMENT

In enacting the ADA, Congress properly invoked its authority under Section 5 of the Fourteenth Amendment to remedy unconstitutional discrimination against cancer patients and other disabled persons. The express language of the ADA indicates that Congress intended to remedy a pattern and practice of constitutional violations. The ADA also explicitly abrogated states' immunity from suits by private individuals.

The legislative history of the ADA demonstrates that Congress specifically considered constitutional violations against disabled persons. Congress also expressly considered evidence of pervasive and irrational discrimination against persons with cancer histories, and concluded that remedial legislation was warranted. And Congress considered evidence of state-sponsored discrimination against persons with cancer.

Furthermore, in evaluating Congress' exercise of legislative power, it is also appropriate to consider evidence outside the legislative record. The two Congresses immediately preceding the one that enacted the ADA considered evidence of pervasive state discrimination against persons with cancer, and irrational employment discrimination against persons with cancer histories, based on myths, unfounded fears, and ignorance of how cancer affects the body. Moreover, at the time Congress passed the ADA, publicly available studies demonstrated pervasive discrimination against cancer patients. Finally, Congress was likely aware that courts were considering discrimination against cancer patients. Here,

such evidence indicates that Congress appropriately enacted the ADA, among other things, to remedy and prevent widespread discrimination against persons with cancer.

ARGUMENT

One of the reasons that Congress enacted the ADA was to remedy unconstitutional discrimination by the states against people with cancer. This Congressional purpose is evident in the language of the statute and its legislative history. In addition, at the time Congress enacted the ADA, widespread evidence outside of the legislative record proved that cancer-based discrimination by the states was a persistent evil in the United States that required national legislation as a remedy. Congress properly addressed this discrimination by explicitly abrogating states' immunity from suit by private individuals and then imposing appropriate remedies. In so doing, Congress properly exercised its enforcement power under Section 5 of the Fourteenth Amendment.

ACS is concerned that if the Court reverses the judgment below, persons with cancer may once again be subject to unconstitutional discrimination. For the reasons set forth below, ACS respectfully requests that the Court affirm the judgment of the Eleventh Circuit.

I. THE STATUTORY LANGUAGE DEMONSTRATES THAT CONGRESS PROPERLY INVOKED ITS SECTION 5 ENFORCEMENT POWER

A. The Statutory Language Proves That Congress Intended To Remedy A Pattern And Practice Of Constitutional Violations

Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Fourteenth Amendment to remedy or prevent constitutional violations. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997); *Florida Prepaid Postsecondary*

Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 639-41 (1999); *Kimel v. Florida Board of Regents*, 120 S. Ct. 631, 634 (2000). To determine whether Congress has validly exercised its enforcement power, this Court typically looks at two factors: first, whether the legislation is intended to remedy or prevent a "pattern and practice" of constitutional violations, and second, whether the legislation is "congruent and proportional" to the injury to be prevented or remedied. *City of Boerne*, 521 U.S. at 534; *Florida Prepaid*, 527 U.S. at 639; *Kimel*, 120 S. Ct. at 645. ACS will address only the "pattern and practice" factor and leave to the Respondents and other *amici curiae* the discussion regarding the congruence and proportionality of this legislation.

This Court looks initially to the express language of any statute to discern Congressional intent behind its enactment.[2] Moreover, the Court has stated that "in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). In particular, the Court examines the text of a statute when evaluating Congress' invocation of enforcement powers under Section 5 of the Fourteenth Amendment to determine Congressional intent behind the enactment. For example, in *United States v. Guest*, 383 U.S. 745, 754-55 (1966), the Court studied the "clear language" of a federal civil rights statute and decided that "the statue d[id]

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[2] *See, e.g., Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 135 (1991) ("[t]he starting point in statutory interpretation is 'the language [of the statute] itself.'") (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). *See also Lewis v. United States*, 445 U.S. 55, 60 (1980) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)); *Owen v. City of Independence*, 445 U.S. 622, 635 (1980) (citing *Andrus v. Allard*, 444 U.S. 51, 56 (1979)).

not purport to give substantive, as opposed to remedial implementation to any rights secured by [the Equal Protection] Clause," and thus was a proper exercise of Congress' Section 5 powers.[3]

The express language of the ADA shows that Congress intended to remedy past and existing unconstitutional discrimination against disabled persons. Specifically, Title I states that its purpose is "to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4) (1994). Accordingly, the Act's stated purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." § 12101(b)(1). The ADA also expressly reflects Congress' knowledge that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

B. The Statutory Language Also Demonstrates That The ADA Remedies Irrational State Action

The statutory language confirms that the ADA was intended to remedy discrimination that rises to the level of constitutional violations. First, the ADA's express language shows that it was intended to remedy state action:

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[3] *See also United States v. Morrison*, 120 S. Ct. 1740, 1747-48 (2000) (examining the language of the Violence Against Women Act of 1994 to determine the scope of the statute); *Florida Prepaid*, 527 U.S. at 644 (noting that the language of the statute did not reveal an alleged Congressional intent).

"[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, . . . voting and access to public services." 42 U.S.C. § 12101(a)(3). The statute carefully defines "Public Entity" as "any state or local government . . . or other instrumentality of a *state*," and specifies that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a *public entity*, or be subjected to discrimination by any such entity." 42 U.S.C. §§ 12131(1)(a), (b); 12132 (1994) (emphasis added).

Also evident in the text of the ADA is Congress' intent to prohibit discrimination by state employers. Title I states that an "employer, employment agency, labor organization, or joint-management committee" may not discriminate against any qualified individual with a disability in regard to any term, condition or privilege of employment. *See* 42 U.S.C. §§ 12111-12 (1994). The definition of employer in the Act specifically excludes certain bodies, but states are not one of the enumerated exclusions. *Id.* § 12111(5)(B). State employers, then, are subject to the ADA. The Court need look no further than the language of the ADA itself for concrete proof that Congress intended to remedy state action.

Second, the language of the ADA confirms that the statute is intended to remedy irrational actions against individuals by the states. If Petitioners are correct that disability discrimination is subject to rational basis review, *see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), this statutory language corroborates that Congress intended to remedy discrimination that was unconstitutional. The statute is rife with references to pervasive, irrational discrimination of various types, including "outright intentional exclusion, . . . exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs,

activities, benefits, jobs." 42 U.S.C. § 12101(a)(5). Furthermore, Congress noted in the statute that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . ." 42 U.S.C. § 12101. Based on the language of the ADA alone, Congress' intent to remedy irrational discrimination is embedded in the statute.

C. Congress Explicitly Abrogated States' Immunity From Suit By Private Individuals

This Court should conclude that Congress properly invoked its Fourteenth Amendment authority to impose remedies against the states by abrogating their Eleventh Amendment immunity. It is well settled that Congress' Section 5 authority is one of the powers that may be used to abrogate the immunity.[4] Furthermore, there can be no dispute that Congress intended to abrogate the immunity, because the statute includes the following provision:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same

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[4] *Kimel*, 120 S. Ct. at 644; *cf. Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996) (the Commerce Clause may not be used to circumvent the Eleventh Amendment's jurisdictional limitations).

> extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202 (1994). Accordingly, the statutory language demonstrates that Congress properly exercised its authority to impose ADA remedies against the states.

II. THE LEGISLATIVE HISTORY OF THE ADA DEMONSTRATES THAT CONGRESS INTENDED TO PREVENT AND REMEDY UNCONSTITUTIONAL DISCRIMINATION AGAINST PEOPLE WITH CANCER AND OTHER DISABLED PERSONS

The legislative history of the ADA confirms that Congress intended, among other things, to remedy a long pattern and practice of pervasive and unconstitutional discrimination against disabled persons. In *Kimel*, the Court searched the legislative history of the Age Discrimination in Employment Act for evidence that Congress considered unconstitutional discrimination and found only "isolated sentences clipped from floor debates and legislative reports." 120 S. Ct. at 649. In stark contrast, the legislative history of the ADA reveals a plethora of studies dealing with state discrimination and lengthy testimony from experts on discrimination against the disabled, as well as direct testimony from disabled persons. Unlike in *Kimel*, the evidence in the ADA's legislative history demonstrates a proper exercise of Section 5 authority.

A. Congress Specifically Addressed Constitutional Harms To Disabled Persons In Passing The ADA

Evidence that Congress considered constitutional violations against disabled persons when enacting the ADA permeates its legislative history. For example, Congress viewed discrimination "from a civil rights perspective" and identi-

fied Americans with disabilities "as a minority group . . . worthy of basic civil rights protections." H.R. Rep. 101-485, pt. 3, at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 448. Congress also described the ADA as "a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation." *Id.* Congress likewise recognized that unequal treatment of disabled persons relegated them "to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the ability of such individuals to participate in and contribute to society." S. Rep. No. 101-116, at 15 (1989). Accordingly, Congress vowed that "[t]his Act will finally set in place the necessary civil rights protections for people with disabilities." *Id.* at 40.

B. Congress Considered Evidence Of Pervasive And Irrational Employment Discrimination Against Persons With Cancer

When passing the ADA, Congress ensured that the "physical impairments" covered by the Act included cancer. The legislative history states that "there still exists . . . widespread irrational prejudice against persons with cancer" and that "being identified as disabled often carries both blatant and subtle stigma." H.R. Rep. No. 101-485, pt. 2, at 75 (1990), 1990 U.S.C.C.A.N. at 358; *see also* H.R. Rep. No. 101-485, pt. 3, at 44, 1990 U.S.C.C.A.N. at 467. As just one example, Congress cited instances of employers that discriminated against cancer patients by requiring medical examinations prior to offering employment and using this information "to exclude applicants with disabilities—particularly those with so-called hidden disabilities such as cancer—before their ability to perform the job was

even evaluated." H.R. Rep. No. 101-485, pt. 2, at 72, 1990 U.S.C.C.A.N. at 355.

A review of the legislative history reveals that Congress evaluated abundant evidence of a pattern and practice of employment discrimination against persons with cancer. Among other things, Congress heard testimony from several experts in the field of cancer research, including reports presented by the National Coalition for Cancer Survivorship, the Disability Rights Education and Defense Fund, and the Metropolitan Life Insurance Company, which had performed a study evaluating the work performance of cancer patients.[5]

The National Coalition for Cancer Survivorship study that Congress considered found that "between 20% and 84% of cancer patients reported employment discrimination attributed to their cancer histories."[6] The report further found that cancer survivors were denied job opportunities because of the myth that cancer is a death sentence, that it is contagious, and that it diminishes worker productivity. *Id.*

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[5] *See Americans with Disabilities Act of 1989: Hearings before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 383 (1989) (prepared statement of the National Coalition for Cancer Survivorship); *Hearing on H.R. 2273, The Americans With Disabilities Act of 1989: Joint Hearing Before the House of Representatives Subcomm. on Education and Labor*, 101st Cong. 88 (1989) (statement of Arlene B. Mayerson, Disability Rights Education and Defense Fund); *Americans with Disabilities Act: Hearing before the House of Representatives Comm. on Small Business*, 101st Cong. 134 (1990) (testimony of Arlene B. Mayerson, Disability Rights Education and Defense Fund).

[6] *Americans with Disabilities Act of 1989: Hearings before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 383 (1989) (prepared statement of the National Coalition for Cancer Survivorship).

Disproving such concerns, the Metropolitan Life Insurance Company presented to Congress a report documenting that employees with cancer histories have work records of comparable caliber to those without a history of cancer.[7]

Taken together, these references in the legislative history show that Congress thoroughly considered irrational discrimination against persons with cancer and reasonably concluded that remedial legislation was warranted.

C. The Legislative History Shows That Congress Considered Evidence Of State Action Against Persons With Cancer

The legislative history also shows that Congress considered evidence of state-sponsored discrimination against persons with cancer. For example, in 1989, ACS presented to Congress evidence that the State of California discriminated against job applicants for an average period of five years after treatment for cancer. In part, ACS found that "discrimination by employers stemmed from concerns that applicants with cancer, or a history of cancer, might not survive long enough to justify the training, that they might need extended periods of sick leave, and that they would cause increases in the cost of health insurance."[8]

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[7] *See Hearing on H.R. 2273, The Americans With Disabilities Act of 1989: Joint Hearing Before the House of Representatives Subcomm. on Education and Labor*, 101st Cong. 88 (1989) (statement of Arlene B. Mayerson, Disability Rights Education and Defense Fund); *Americans with Disabilities Act: Hearing before the House of Representatives Comm. on Small Business*, 101st Cong. 134 (1990) (testimony of Arlene B. Mayerson, Disability Rights Education and Defense Fund).

[8] *Hearing on H.R. 2273, The Americans With Disabilities Act of 1989: Joint Hearing Before the House of Representatives Subcomm. on Education and Labor*, 101st Cong. 87-88 (1989) (statement of Arlene B. Mayerson, Disability Rights Education and Defense Fund) (citing R.

(Footnote cont'd on next page)

In spite of this evidence, Petitioners argue that before enacting the ADA, Congress did not identify a pattern of prior constitutional violations by the states. To support this assertion, Petitioners cite a variety of state statutes intended to address discrimination. In essence, Petitioners argue that the mere existence of these statutes proves beyond doubt that states could not have discriminated against persons with disabilities. But the legislative record reflects that these statutes were so inadequate that national legislation was required to protect persons with disabilities. In fact, the record shows that after hearing evidence of state discrimination, Congress concluded that "[t]he . . . inconsistent treatment of people with disabilities by different State or local government agencies is both inequitable and illogical for a society committed to full access for people with disabilities." H.R. Rep. No. 101-485, pt. 2, at 37. The statutes Petitioners cite created, at best, "an inadequate patchwork of state laws for potential relief."[9] Congress concluded that the wide gaps in state law left states free to discriminate unconstitutionally against disabled persons and determined that remedial legislation was necessary and appropriate.

(Footnote cont'd from previous page.)

McKenna, *Employability and Insurability of the Cancer Patient*, 2-3 (Nov. 25, 1974)); *Americans with Disabilities Act: Hearing before the House of Representatives Comm. on Small Business*, 101st Cong. 133 (1990) (testimony of Arlene B. Mayerson, Disability Rights Education and Defense Fund) (citing R. McKenna, *Employability and Insurability of the Cancer Patient*, 2-3 (Nov. 25, 1974)).

[9] *Americans with Disabilities Act of 1989: Hearings before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 388 (1989) (prepared statement of the National Coalition for Cancer Survivorship).

Indeed, notwithstanding these state statutes, employment discrimination continues to be an issue of significant concern to cancer survivors. Similarly, ACS estimates receiving up to three calls per month from cancer survivors describing employment discrimination they have faced.[10] As a result of this discrimination, employees continue to file lawsuits seeking to redress discrimination based on cancer histories. Congress' view that the state statutes were inadequate has been borne out.

III. EVIDENCE OUTSIDE OF THE LEGISLATIVE RECORD ALSO PROVES THAT THE ADA WAS APPROPRIATE REMEDIAL LEGISLATION

In *Turner Broadcasting System, Inc. v. Federal Communications Commission*, the Court confirmed that it is appropriate to consider evidence outside of the legislative record in evaluating Congress' exercise of legislative power. 520 U.S. 180, 200, 209, 211-13 (1997). Evidence outside of the legislative record proves that the ADA was appropriate remedial legislation.

In *Turner*, the Court considered Congress' enactment of the Cable Television Consumer Protection and Competition Act. The Court evaluated "evidence assembled on remand" consisting of expert submissions, studies and sworn testimony to determine whether Congress had identified a sufficient governmental interest to allow it to impinge on various corporations' first amendment rights. 520 U.S. at 208-09. In the Court's view, this evidence outside of the legislative record confirmed that Congress acted reasonably by furthering an important governmental interest. In its ruling,

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[10] Letter from Lisa Guzman, American Cancer Society, to Michael Johnson and Juliet Burnette, American Cancer Society (June 6, 2000).

the Court noted that Congress is not obligated to record in the legislative record the kind of detail required of an administrative agency, and said inclusion of such detail wholly within the legislative record is "constitutionally unwarranted." *Id.* at 213.

As described below, evidence outside of the legislative record proves that Congress exercised sound judgment in deciding that legislation was needed to remedy discrimination against disabled persons.

A. Evidence Regarding Pervasive Discrimination By States Against Persons With Cancer

When the 101st Congress enacted the ADA, studies abounded concerning discrimination against cancer patients. Much of this evidence was considered in connection with legislation proposed in the 99th and 100th Congresses, many of whose members were part of the 101st Congress. Under *Turner*, Congress could have considered this evidence without being obligated to include it in the ADA's legislative record. Evidence presented to Congress in connection with these prior bills demonstrates that when it passed the ADA, Congress acted appropriately to remedy and prevent widespread state-sponsored discrimination against persons with cancer.

For example, when considering an employment discrimination bill in the mid-1980s, the 99th Congress specifically considered evidence of state discrimination against those with cancer. The Institute on Social Oncology presented evidence that discrimination against persons with cancer histories "is more prevalent in the public sector," including

instances of discrimination by boards of education, the military, and Government agencies.[11]

Similarly, in 1986, the same Congress considered pervasive discrimination by the public sector against persons with cancer histories, stating that "both public and private employers have been guilty of employment discrimination against employees with a cancer history, notwithstanding studies and thousands of case histories showing individuals with a history of cancer to be as productive as other employees." H.R. Rep. No. 99-774, at 2 (1986). The Committee noted in the report that such discrimination stems from false beliefs about cancer survivors and is extremely costly to society. *See id.* That same year, the House Committee on Education and Labor of the 99th Congress issued a report on a concurrent resolution (H. Con. Res. 321) expressing Congress's sense of "opposition to employment discrimination against persons who have, or have had, cancer[,] based on such individual's cancer history." *Id.* at 1. The report noted that over one million Americans face discrimination in the forms of "job denial, wage reduction, exclusion from and reduction in employee benefits, promotion denial, and in some cases, outright dismissal." *Id.* at 1-2.

In 1987, the 100th Congress also evaluated evidence of discrimination by public entities, this time by the New York Civil Service Commission in Nassau County, New York. An applicant who had applied to the Commission for a job on the New York police force was rejected because he had a

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[11] *Employment Discrimination Against Cancer Victims and the Handicapped: Hearing before the House of Representatives Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, 99th Cong. 57 (1985) (statement by Dr. Ivan Barofsky, from the Institute of Social Oncology).

history of cancer. Even though he had been free of cancer for ten years, and had passed all of the requisite physical and psychological tests, the Commission rejected him. The Commission's medical requirement automatically disqualified anyone with a history of a malignant tumor.[12]

These were not isolated events. The United States Coast Guard, the New York Highway Department, and the Peace Corps also had discriminated against cancer survivors.[13] Taken together, the evidence demonstrates a pattern and practice of unconstitutional discrimination against persons with cancer.

B. Evidence Regarding Irrational Discrimination Against Persons With Cancer

Evidence presented in connection with prior bills considered by the 99th and 100th Congress also shows that employers discriminated against cancer patients based on myths, unfounded fears, and ignorance of how cancer affects the body. This was true even for patients who had long since recovered from cancer. In fact, one House Report noted that, "[a]lthough sixty-five percent of [patients who suffered from childhood leukemia] are able to lead a normal life after

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12 *See Hearing on Discrimination Against Cancer Victims and the Handicapped: Hearing Before the House of Representatives Subcomm. On Employment Opportunities of the Comm. on Education and Labor*, 100th Cong. 61-62, 71 (1987) (statement of Timothy Calonita, former cancer patient).

13 *See Employment Discrimination Against Cancer Victims and the Handicapped: Hearing before the House of Representatives Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, 99th Cong. 6-7 (1985) (prepared statement of Robert McKenna, M.D., President, American Cancer Society).

treatment, many schools deny them entry simply based on a cancer history."[14]

The information considered by Congress showed that despite medical evidence to the contrary, employers discriminated against cancer patients, believing that cancer caused imminent death, that it was contagious, and that cancer survivors were unproductive workers. This discrimination had no scientific or medical basis and no connection to worker productivity or performance.[15] Direct evidence presented to Congress proved that in reality, survival rates of cancer patients under the age of fifty-five are over eighty percent, cancer cannot be transferred in the workplace, and cancer survivors have the same productivity rates as other workers.[16] Supporting these statistics, a study of employees of the Metropolitan Life Insurance Company found that:

> 1. The turnover rate among employees with a cancer history was no higher than the rate of people cancer-free.
>
> 2. No employee in the cancer group was discharged for absenteeism or poor performance.
>
> 3. Only three percent of the cancer employees were ever placed on disability.[17]

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[14] *Hearing on Discrimination Against Cancer Victims and the Handicapped: Hearing Before the House of Representatives Subcomm. On Employment Opportunities of the Comm. on Education and Labor*, 100th Cong. 32 (1987) (prepared statement by Mario Biaggi, Representative).

[15] *See id.* at 41-42 (prepared statement of Barbara Hoffman, National Coalition for Cancer Survivorship).

[16] *See id.*

[17] *Id.* at 33 (prepared statement by Mario Biaggi, Representative).

The information presented to Congress showed that breast cancer patients were particularly vulnerable to baseless discrimination, even after having recovered from cancer. For example, the 99th Congress considered testimony indicating that approximately one out of four breast cancer patients who could be considered recovered were having employment problems. The ratio was even higher among those who were less than five years past diagnosis. [18] Because of their breast cancer, these patients were denied employment, fired from their jobs, or denied promotions.[19]

Before the same Congress, numerous witnesses testified about the prevalence of such discrimination against cancer patients.[20] In fact, prior to the enactment of the ADA, discrimination was so widespread that ACS estimated that one million of the five million people with cancer or a history of cancer faced some sort of employment discrimination.[21] In addition, this discrimination spanned blue collar and white collar employment. A study by a University of Southern California professor indicated that "half of cancer patients in white-collar jobs and 84% of those in blue collar occupations

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[18] *Employment Discrimination Against Cancer Victims and the Handicapped: Hearing before the House of Representatives Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, 99th Cong. 11-12 (1985) (prepared statement of Sarah Splaver, Ph.D., President of Cancer Hopefuls United for Mutual Support).

[19] *Id.* at 12.

[20] *Id.* at 2-73.

[21] *See Hearing on Discrimination Against Cancer Victims and the Handicapped: Hearing Before the House of Representatives Subcomm. On Employment Opportunities of the Comm. on Education and Labor*, 100th Cong. 2 (1987) (statement of Mathew Martinez, chairman of the subcommittee); *id.* at 41 (prepared statement of Barbara Hoffman, National Coalition for Cancer Survivorship).

suffered some kind of discrimination when they returned to work."[22]

Finally, prior to passage of the ADA, Congress heard evidence that even though cancer patients were becoming a larger part of the workforce, no current law protected them from discrimination because they were not "handicapped" as defined under the Rehabilitation Act of 1973.[23] As a result, cancer patients who lost their jobs due to cancer were generally forced to lie about their medical histories when they sought other employment.[24] This situation pointed to the need for federal legislation to remedy discrimination against persons with cancer.

C. Evidence From Studies Demonstrating Discrimination Against Persons With Cancer

At the time the Congress passed the ADA, publicly available studies also demonstrated that discrimination against cancer pervaded society. These studies mirror the

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[22] *Employment Discrimination Against Cancer Victims and the Handicapped: Hearing before the House of Representatives Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, 99th Cong. 6 (1985) (prepared statement of Representative Mario Biaggi) (referring to study by Dr. Frances Feldman, a University of Southern California professor); *see id* at 19 (prepared statement of Robert McKenna, M.D., President, American Cancer Society) (citing Feldman, F.L. Work and Cancer Health Histories: A Study of the Experiences of Recovered Patients – White Collar Study. San Francisco American Cancer Society, 1976; Feldman, F.L. Work and Cancer Health Histories: A Study of the Experiences of Recovered Patients-Blue Collar Study. San Francisco American Cancer Society, 1976).

[23] *See id.* at 31 (prepared statement of Michael Spekter, Board of Directors, the Alliance for Cancer Patients and their Families).

[24] *See id.* at 12 (prepared statement of Sarah Splaver, Ph.D., President of Cancer Hopefuls United for Mutual Support).

results of those in the ADA's legislative record. For instance, three years before Congress passed the ADA, one study showed that as many as ninety percent of cancer survivors faced some form of discrimination in the work place.[25] As another example, a 1985 Stanford University study of 403 Hodgkin's disease survivors found that forty-three percent of them experienced difficulties at work that they attributed to their cancer histories.[26]

Another 1985 study documented that discrimination was state-sponsored. The study pointed out that the nation's largest employer, the military, openly rejected healthy men and women for enlistment solely because of cancer history.[27] The same study discussed discrimination against a woman who had "passed the written and agility tests for admission to the New York Police Department . . . [, and] [d]espite her test performances, was rejected in August 1984, solely because she once had Hodgkin's disease," even though she had been totally free of cancer for more than five years. *Id.* at 8. According to the New York Police Department's own testing

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25 Katherine Streicher, *Cancer Based Employment Discrimination: Whether the Proposed Amendment to Title VII Will Provide An Effective Anti-Discrimination Remedy*, 62 Ind. L.J. 827 (1987) (citing Cal. Gov. Code § 12921 (West 1981) and Vt. Stat. Ann. Tit. 21, § 495).

26 Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 Temp. L.Q. 1, 3-4 (1986) (citing P. Fobair, R. Hoppe, J. Bloom, R. Cox, A. Varghese & D. Spiegel, Psychological Problems Among Survivors of Hodgkin's Disease 9 (Aug. 30, 1985) (unpublished manuscript submitted to *Journal of Clinical Oncology*)).

27 *Id.* at 1, 8 (citing Monaco, Socioeconomic Considerations in Childhood Cancer Survival: Society's Obligations 8 (April 1985) (unpublished manuscript)).

standards, she was a healthy, strong, and intelligent woman who was qualified to serve on the force. *Id.*

These are precisely the kind of studies Congress evaluated when enacting the ADA and they further prove that Congress acted appropriately in passing remedial legislation to address pervasive discrimination.

D. Evidence Of Discrimination Against Cancer Patients In Cases Handled By Lower Courts

In all likelihood, at the time the ADA was being considered, Congress was aware that courts were addressing discrimination against cancer patients as well. *See, e.g., Goldsmith v. New York Psychoanalytic Inst.*, 73 A.D.2d 16 (N.Y. App. Div. 1980). In *Goldsmith*, for example, the Court held that "[p]rivate and public industry routinely deny employment to many qualified individuals because of unfounded fears, such as high absenteeism and imminent death." *Id.* In that case, the plaintiff, a cancer survivor, applied for admission to the New York Psychoanalytic Institute, which disapproved the plaintiff's application due to her history of Hodgkin's disease. *Id.* The plaintiff was otherwise highly qualified and received excellent evaluations from the committees reviewing her application. *Id.* Likewise, in *Department of Fair Employment and Housing v. Kinsburg Cotton Oil Co.*, the defendant fired an employee with a cancer history, allegedly due to excessive absenteeism, although the employee had "not missed more work than anyone in the office at that time."[28] These cases prove concretely that persons with cancer were facing irrational

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[28] No. FEP80-81, 1984 CAFEHC LEXIS 18, 25-29 (Cal. Fair Employment and Housing Commission, Dec. 7, 1984) (cited by Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 Temp. L.Q. 1, 16 (1986)).

discrimination at the time Congress was considering the ADA.

CONCLUSION

Congress properly invoked its power under Section 5 of the Fourteenth Amendment to remedy unconstitutional discrimination against cancer patients and other disabled persons. Accordingly, the Court should affirm the judgment of the Eleventh Circuit.

Respectfully submitted,

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